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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1216.

42ND ST. FOTO SHOP, INC., FOTOSHOP, INCORPORATED and SAM MARCUS, d/b/a MARCUS PHOTO SERVICE and as FOTOSHOP,

Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION.

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STATUTE.

New York State Labor Relations Act, Labor Law of the State of New York, Article 20, Being Laws of 1937, Chap. 443, Sec. 1 25

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NEW YORK STATE LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The Final Decision and Order of the New York State Labor Relations Board (hereinafter referred to as the Board) is reported in 5 S. L. R. B. (N. Y.) 1350. The decision made at Special Term, Supreme Court of New York, New York County, is not officially reported and appeared in New York Law Journal (Vol. 109, No. 130, June 5, 1943).

The decision of the Appellate Division, First Judicial Department, affirming the decision made at Special Term, is reported at 268 App. Div. 759 (case 4). The decision of that same Court, denying leave to appeal to the Court

of Appeals, is reported at 268 App. Div. 849 (Case 6). The decision of the Court of Appeals of the State of New York, the highest court of the State, denying the application for leave to appeal to it, is reported in 293 N. Y. (Weekly Advance Sheets No. 297—Jan. 6, 1945, p. i).

No opinions were written by any of the Courts below, except for the memorandum of Special Term (R. 4).

Jurisdiction.

Jurisdiction to entertain this petition is based upon the Judicial Code, section 237(a), amended (28 U. S. C. §344).

Questions Presented.

The questions presented are set forth in full in the Petition, pages 3-4, and are here incorporated by reference.

Statutory and Constitutional Provisions Involved.

The statutory and constitutional provisions involved are set forth at length in the Appendix, page 25, 26.

Statement.

Those portions of the record below that are germane to the issues raised by the Petition are contained in the Statement of the Petition, pages 5-30 to which reference is respectfully made. Hence, that statement of facts is not here repeated. Reference will be made in the Argument hereinbelow presented, to that Statement.

Specification of Errors to Be Urged.

The errors to be urged are stated in the Petition, page 30, and are here incorporated by reference.

Argument.

> "But I must admit that in overriding the findings of the Texas court we are applying to Thomas a

rule the benefit of which in all its breadth and vigor this court denies to employers in National Labor Relations Board cases (citing cases). However, the remedy is not to allow Texas improperly to deny the right of free speech but to apply the same rule and spirit to free speech cases whoever the speaker". Jackson, *J.*, concurring in *Thomas* v. *Collins* (*not yet officially reported*, 89 Law ed. Adv. Op. 340, 356).

Just prior thereto Justice Jackson wrote:

> "Free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men. And if the employees or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil, but permit the speech, if the two are separable; and only rarely and when they are inseparable to stop or punish speech or publication" (loc. cit., p. 356).

From that fundamental statement stem the contentions of petitioners. In view of the almostt complete identity of the pertinent provisions of the National Labor Relations Act (29 U. S. C., §151 *et seq.*) with those of the Labor Relations Act of the State of New York (*Matter of Davega-City Radio, Inc.* v. *State Labor Relations Board*, 281 N. Y. 13, 22), this proceeding raises for the first time the issue

of application of the constitutional guarantees to an employer, in the light of the requirements of the State Act.

Nine states other than New York have enacted labor relations acts:

Colorado
Kansas
Massachusetts
Michigan
Minnesota
Pennsylvania
Rhode Island
Utah
Wisconsin

While varying in details, and in some important provisions as well, one common denominator, present in the New York State Act, is found in all these other state enactments, to-wit, the guarantee to employees of their right to self-organization, free from interference, restraint or coercion of an employer.

In two important respects some of these state acts are distinctive. Those of Colorado and Kansas specifically provide that their labor relations acts are not to be construed in derogation of the constitutional right of free speech.

Those of Michigan, Minnesota, Pennsylvania and Wisconsin include a category of unfair labor practices that may be committed by employees, or their representatives. Such a provision is not found in the New York State Act.

The importance of, then, if not indeed the need for, a definitive statement by this Court, defining the applicability of the constitutional guarantees in labor disputes within a state and arising out of a state act, is obvious. This Court has quite recently elaborated upon that in respect of the obligations and duties imposed upon employers by

provisions of the National Labor Relations Act. No case has yet been presented to this Court, which raises this issue, stemming out of the enforcement by a state court of the provisions of a state labor relations act.

This issue constituted the basis for the jurisdiction assumed by this Court in *Senn* v. *Tile Layers Protective Union, et al.*, 301 U. S. 468. Involved there was an attack upon the determination of the Supreme Court of Wisconsin in a proceeding based upon the provisions of the Wisconsin Labor Code (Wisconsin Statutes, 1935, §§103.51-103.63).

In denying a motion to dismiss the appeal for want of jurisdiction, on the ground that no substantial Federal question was presented, this Court wrote:

> "Whether the statute as construed and applied violates the Fourteenth Amendment presents issues never expressly passed upon by this Court" (page 477).

The case at bar similarly presents an instance of construction and application of the State Labor Relations Act, determined in the face of constitutional objection, never expressly passed upon by this Court.

Petitioners' contention at the moment is not that this Court should reverse the determination reached by the New York courts. It is merely that this substantial question, arising under the Constitution, has never before received the attention of this Court. The ultimate outcome, should the petition be granted, may or may not result in affirmance of the conclusion reached by the New York courts. That does not, it is respectfully urged, dispose of the need for clarification of this issue, particularly as it will affect statutes common to some ten states.

Parenthetically it may be observed, in view of the record fact that this matter was not considered by the

New York Court of Appeals on appeal, but was decided by it by denial of an application for leave to appeal, that nevertheless, such action by that Court was a final determination. *Chicago and Eastern Illinois Railroad Co.* v. *Industrial Commissioner of Illinois, et al.*, 284 U. S. 296, where certiorari was granted after the Supreme Court of Illinois had declined to review.

The test is:

> " * * * whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking of Nebraska, Receiver* v. *Pink*, 317 U. S. 264, at page 268.

The decision herein by the Court of Appeals

> " * * * ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. (Cases cited.) This rule applies with equal force to cases from New York, in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of §237 of the Judicial Code, a final judgment reviewable here" (idem, pages 267-8).

That is precisely the situation in the instant case. All that remained to be done after the order of the Court of Appeals was to enter that order as the order of the Supreme Court (R. 1403-4).

Any discussion of the right of free speech, vis-a-vis the requirements of a labor relations act upon employers, must commence with *National Labor Relations Board* v. *Virginia Electric and Power Co.*, 314 U. S. 469. There the Board's complaint charged the employer with having engaged in unfair labor practices within the meaning of §8(1), (2) and (3) of the National Act (29 U. S. C., §158 [1], [2] and [3]). §8(1) is substantially similar to §704 (10) of the New York State Act (*infra*, page 26). §8(3) of the National Act is substantially similar to §704 (5) of the State Act (*infra*, page 26). §8(2) of the National Act is substantially similar to §704(3) of the State Act (*infra*, page 25). No charge based upon this last provision was made against petitioners by the State Board, its Complaint and Findings being limited to §704(4), (5) and (10) (R. 30-1, 1354).

In the case at bar, there was no independent union, and therefore no union contract with the closed shop and check off provisions, as found in the *Virginia Electric* case. Thus, the important element of the employer actively favoring one union, and that an independent one, as against another, as found in the *Virginia Electric* case, accompanied with incidents such as meetings on company premises and on company time, assistance of company supervisors, watching of meetings of the rival union, are here absent.

To be true, it may be urged *contra*, that there is no distinction in principle between acts by an employer favoring one union as against another, and between acts of an employer favoring no union as against union. However, it must be conceded that the actions of an employer that result affirmatively in the establishment of an independent union, always regarded with suspicion, constitute more objective testimony of interference than do mere expressions of opinion by an employer not followed by the establishment of a so-called independent union.

That this was gravamen of the *Virginia* case is shown by the order of the National Board, which, concerned almost entirely with the independent union, required withdrawal of recognition from, and disestablishment of, that organization (case cited, pages 474-5). And see the same case in 319 U. S. 533, at pages 535-7.

However, the holding in the *Virginia Electric* case is of more fundamental significance. This Court therein has apparently resolved with finality whatever basic issue that may have existed between the guarantees of the First Amendment and the obligations of an employer under the National Act.

> "The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But, certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways" (case cited, at p. 477).

This proposition must now be accepted as the last word of this Court in respect of that which is required of an employer under the National Act, vis-a-vis that employer's constitutional right of free speech. There still remains, however, the immediate question of application of the benefit of this rule.

Merely to announce that an employer's right of free speech may not be infringed, while at the same time visit-

ing upon an employer the consequence that follows from adjudging an employer to have violated a statute, affords very little implementation of the right guaranteed to the employer. The "breadth and vigor" with which this rule is applied is the test of its equality. To whittle it away by fastening the rule automatically on to every situation involving alleged anti-union comment by an employer, is to preserve its form, and at the same time destroy its substance.

That this was not the intent of this Court is shown by its denial of certiorari in *National Labor Relations Board v. American Tube Bending Company*, 134 Fed. 2d 993, cert. den. 320 U. S. 768. Thus it becomes important to advert to the facts of the *Virginia Electric* case and to discuss facts parallel in the case at bar, in the light of the holding of this Court in the *Virginia Electric* case, as reported in 314 U. S.

Commenting upon the National Board's finding that the utterances of the employer (in the *Virginia Electric* case) were unfair labor practices, and noting that the National Board had not "raised them to the stature of coercion by reliance on the surrounding circumstances", this Court concluded that it was "not sufficiently certain from the findings that the Board based its conclusion with regard to the Independent upon the whole course of conduct revealed by this record. Rather, it appears that the Board rested heavily on findings with regard to the bulletin and the speeches, the adequacy of which we regard as doubtful" (page 479).

In its subsequent disposition of the *Virginia Electric* case, 319 U. S. 533, this Court was satisfied that the hiatus that had impelled the remand had been filled. "These findings and conclusions are not subject to the infirmities of the original ones which prompted our decision in 314 U. S. 469" (319 U. S., at pages 539).

Such "infirmities" however, are present in the case at bar. May it be reiterated that whereas in the *Virginia*

Electric case the Board found in existence a tangible thing, to-wit, the independent union, and upon which it relied entirely (319 U. S., at pages 535-7), nothing akin to that exists at bar. Thus in the *Virginia Electric* case is found this objective fact, and one that bore a direct relationship to the complained of discharges and complained of collection of dues by check-off. The discharges in the *Virginia Electric* case took place during the period that the condemned contract was still in force. All of this is missing at bar.

In the instant proceeding the Board relied upon the discharges (R. 1222), with the same weight that the National Board in the *Virginia Electric* case relied upon the formation of the independent union. But there is a vast difference between the two.

All of the evidence ante-dating January 1st, 1942, upon which the Board here relied to show coercion, restraint and interference, is subject to two fatal infirmities. The Board's own complaint specifically limited restraint, coercion and interference to a period after January 1st, 1942 (R. 29, page 16). While this may be characterized as a formal or procedural objection, the contrary is quite the fact.

Were it not for the erroneous admission of the testimony of comment ante-dating January 1st, 1942, the Board would have had absolutely nothing upon which to find discriminatory discharges during January, 1942. This comment is the only testimony in the record that ante-dates the discharges. Were it excluded, as it should have been under the Board's complaint, the Board would not have been able to attribute the discharges to anti-union bias.

Thus this objection is not merely formal nor procedural, but is substantive. This, then, brings up to the second infirmity, directly pertinent under this Petition.

As the record makes abundantly clear (Petition, pages 12 ff.), all of the testimony relating to incidents ante-dat-

ing January 1st, 1942 was concerned with extraneous happenings and had nothing whatsoever to do with the activities of the union involved.

Indeed, the Board's own star witness, Irving, admitted that this comment was made to customers, was not directed to employees, and that counter-comment by employees was neither contradicted nor criticized (Petition, pages 14-16).

To deny to such expression of opinion the protection of the First Amendment is to emasculate from the rule announced by this Court in the *Virginia Electric* case, any "breadth and vigor" whatsoever. To say, in effect, that an employer may not express an opinion concerning a matter of such public interest as the Gimbel Bros. strike, involving as it did a great business enterprise, located in close propinquity to the place of business of the utterer, and of such proportions that four hundred pickets marched on a picket line, is to muzzle, thoroughly and completely, an employer, and make a mockery of the right of free speech (Petition, page 14).

Particularly is this so when the stark fact emerges that the most exhaustive search of the record fails to show the slightest trace of coercion, even in the most nebulous, subtle or suggestive manner. *A fortiori,* the record shows not the slightest indication, based upon this phase of the testimony, of actual criticism, coercion, restraint or interference.

Petitioners candidly concede that, because of the economic relationship of an employer and an employee, "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequence of incurring that employer's strong displeasure". *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, at page 78.

But at bar there was no "choice between unions". There were no unions involved at all, at the time the comment was made. Not by the widest stretch of the imag-

ination may it be said, on the basis of the record here, that any restraint, coercion or interference, either accompanied or followed the making of that comment, to say naught of discriminatory discharges.

Here was a small retail business, with a small number of employees, and a quite close contact between the employer and the employees, almost continuous during the business day. Customers came and went, and of course a situation as pronounced as the tremendous picket line just across the street became inevitably a topic of talk. All participated in it (Petition, page 15).

According to the Board, any supervisory employee who felt impelled to say anything about that situation, should have whispered it. That is not free speech.

Similar argument is properly addressed to the other extraneous circumstance, out of which came the comment that the Board, by a tremendous leap, fastened on to the employer as a violation of the Act. Quite apart from the fatal time element, this comment sprang out of a strike conducted by a totally unrelated and unconnected union, against a business altogether different from, and not connected with, the employer of the discharged employees (Petition, pages 15, ff.).

Here was a strike, ended by injunction (R. 608), obviously a judicial determination, in the light of the stringest provisions of New York law (Civil Practice Act §876-a) that it was totally unwarranted and unauthorized.

Was the employer involved in that strike thereby deprived of a thoroughly natural and spontaneous reaction? And one free from even hints of restraint or coercion? The Board says yes.

The Board so answered, even though the record again may be searched in vain for the slightest trace or suggestion of coercion, restraint or interference that flowed therefrom, or may be rationally attributed thereto.

This fatal infirmity is not cured, even though the remarks attributed to Sam Marcus on February 3rd, 1942 be accepted in their entirety (R. 1348-9). Fair play impels petitioners at this point to bring to this Court's attention the inclusion by the Board in its Decision (R. 1348-9) of the words "gangsters and racketeers" as having been part of Marcus' remarks, despite the fact that one of the three Board witnesses who testified on this point specifically said that no such characterization was employed (R. 361) and another did not even mention them (R. 705-6).

This incident of February 3rd, 1942 is the first, and only, testimony in the record that connects the employer of the discharged employees, 42nd St. Foto Shop, Inc., with the complaining union. It occurred *after* the discharges (these took place on January 12th and January 23rd, 1942 [R. 1352]).

This is leap frog with a vengeance. By what process of rationalizing, and even assuming that Sam Marcus, on February 3rd, 1942, by his talk, restrained, coerced and interfered with the employees, may the Board attribute the prior discharges to that subsequent act?

The discharges are the only objective, tangible acts found by the Board. Not one iota of testimony was adduced to show that the talk of February 3rd, 1942 had any coercive, restraining or interfering effect whatsoever. Indeed, the very opposite is shown for one of the Board's star witnesses, Hertzel, who testified at length months after the date of the talk (May 6, 1942; R. 255, 328), was a member of the union and was still an employee of 42nd St. Foto Shop, Inc. when he testified (R. 328, 341).

Caught within this dilemma, the Board took refuge in vagueness and generality. The comment of this Court, made concerning the National Board's first decision in the *Virginia Electric* case, as to lack of certainty upon what that Board's conclusion was based, is applicable

here. If the Board here rested upon anything, it rested upon this comment, both before and after January 1st, 1942, and to say the least, the adequacy of that is doubtful.

If it rested upon a whole course of conduct, evidenced in part by these utterances, that does not appear from the Board's decision.

In a recent pronouncement, *Thomas* v. *Collins*, loc. cit., *supra*, this Court has reiterated the rule announced by it in the *Virginia Electric* case:

> "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. * * * Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. * * * But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection" (pages 351-2).

And further:

> "The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor altogether, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller

> than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty" (page 354).

And from Justice Jackson's concurring opinion:

> "Speech of employers otherwise beyond reach of the Federal Government is brought within the Labor Board's power to suppress by associating it with 'coercion' or 'domination'. Speech of political malcontents is sought to be reached by associating it with some variety of 'sedition'. Whether in a particular case the association or characterization is a proven and valid one often is difficult to resolve. If this Court may not or does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one" (page 356).

A union may conduct its organizational activities in a variety of ways. Here the union chose to do it by an attack upon the employer, which was designed to, and in fact did, reach the public by scattering circulars around.

Was the employer, perforce, to remain silent? The union acted as it did under the guarantees given by the State Act (*infra*, page 25). The only method of reply open to the employer was to reply. That it did. At the worst, it was *"et tu Brute"*.

And in that reply is the employer to be forbidden to discuss the accusations against him, " * * * to turn publicity on the records of the leaders or the unions which seek the confidence of his men", or even " * * * to per-

suade to action with respect to joining or not joining union * * *"?

This Court itself declares that the limit of this right is not passed until " * * * other things are added which bring about coercion, or give it that character", or until " * * * the employer's speech is associated with discriminatory discharges or intimidation, * * *". *Thomas* v. *Collins, ubi supra.*

Upon the record here there was neither coercion nor intimidation, nor aught that gave it that character. Has not the State of New York, then, denied to petitioners the equal protection of its laws?

True, that has not been done by statutory enactment, but mere enactment does not produce life,—a statute is made viable only through application and construction by the courts. In effect, did not the courts of New York say to petitioners, we will allow this union to vilify and criticize you, not only before your employees, but before the public as well, but in reply, you may only say "tsk tsk".

It is no answer to say that the employer may resort to law if it has been libeled. As a practical matter, that is worthless. The time drag alone disposes of it as a means of defense, let alone the numerous other considerations that render such action against an employer of no value (cf. *Truax* v. *Corrigan*, 257 U. S. 312, 331 ff.).

The employer responded in the forum that the union selected, to-wit, the employees. While provocation will not suffice to insulate against an otherwise unlawful act, there was here in abundant measure, both manifest provocation, accompanied by no unlawful act. For, based upon the declarations of this Court, the response becomes unlawful only if accompanied with that, which, by application of reasoning, may clearly be denominated as coercion or intimidation. The employees were told that they could do as they pleased. In fact, so they did, and further in fact, nothing whatsoever appears in the record, indicating any

actual or implied

act by the employer, showing
coercion or intimidation.

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sembled at two meetings.

The Circuit Court posed the
pertinent to the issue at bar.

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> if so, whether they were
> Amendment" (page 994).

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lent of the National Act (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 at pp. 222, 3)". *Matter of Davega-City Radio, Inc.* v. *State Labor Relations Board*, 281 N. Y. 13, at pages 21-2.

If petitioners' contentions be sound, then it is clear that the courts of New York have decided a Federal question in a manner inconsistent with the holdings of this Court.

It would unduly extend this argument to include herein extracts from the letter and speech sent and made by the employer (in the *American Tube Bending* case) on the very eve of an ordered election, a factor, incidentally, altogether missing in the proceeding at bar.

The employees were given the alternative of choice between having a union represent them or "whether you want to continue as we have been doing, discussing your own matters individually" (page 996); they were told that under the existent regime "each of you can have a sympathetic hearing for your own personal problems, and adjustments made that are fair all around" (*idem*); they were asked concerning the "kind of leadership" to which they were going to entrust their future. whether it is open, above board and dependable (*idem*); they were told that the company maintained "an open shop in a true sense of the word" (page 997); they were informed that instead of flexible wage rates permitting "as many as four increases in a year", under a collective bargaining contract wage rates tend to be established for a year, which "may interfere with the recognition of improvement" (*idem*); they were told that if they have someone represent them, they have got "to pay for that representation" (*idem*); to them was posed the question, who are these strangers who have "all of a sudden become so interested in your welfare"; and then the final question put, "Is your status under my leadership something that you can improve by choosing someone else for your leader?" (page 998).

Unquestionably, the language used by the president of the *American Tube Bending Co.* was more carefully selected and thought out, and more happily phrased than that employed by Marcus. That was undoubtedly due to Marcus' spur of the moment reaction, for his talk followed close upon the distribution of the offensive and vilifying circular. But if substance is to be regarded, rather than form, and certainly in a matter as grave as this, substance should be looked at, there is a great deal of similarity of thought between what Marcus said and what the *American Tube Bending Co.* wrote and said. Nevertheless, the Circuit Court unanimously was of opinion that the comment fell well within the privilege afforded by the First Amendment.

More recently, the Third Circuit considered this same proposition in *Budd Mfg. Co.* v. *National Labor Relations Board,* 142 Fed. 2d 922. There a petition for an order adjudging the *Budd Co.* and its president, individually, guilty of contempt, was dismissed.

A preliminary observation is pertinent. A distinction may be sought between the proceeding at bar and the *Budd Mfg. Co.* case, on the ground that the latter, being a contempt proceeding, contemplated the imposition of penal sanctions on the alleged offender, whereas in the case at bar, an unfair labor practice was sought merely to be abated. No such distinction lies. If the holdings of the New York courts be sustained, petitioners ultimately will face the alternative either of compliance, or of a contempt proceeding to enforce compliance. Thus, in respect of this phase, there is no substantive difference,—consequently what was said in the *Budd Mfg. Co.* case is pertinent here.

In the *Budd Mfg. Co.* case a letter and circular were involved. The letter, written after the denial by this Court of certiorari to review the previous order made by the Circuit Court directing enforcement of the National Board's order (138 Fed. 2d 86, cert. den. 321 U. S. 778)

informed the employees that they might have no union, affiliate with an outside union, or form an independent union (page 930).

The *Budd* case is even stronger than the case at bar, for here there is no independent union nor even the assertion that the union involved at any time represented the employees or claimed such representation.

The enclosure with the letter pointed out that "there has been 10 years of industrial peace in our plants" (page 931), that it is not necessary for an employee "to join any particular labor organization, in spite of anything he may be told to the contrary" (*idem*), that the company would recognize an independent union (*idem*), that in choosing between an outside union and one of their "own", the employees must determine "which form of representation will be better for you as an employee of this Company, and which one will be more likely to enable your Company to operate most efficiently and continue to be able to pay you the highest wages" (*idem*), and then posed questions, such as:

> "To what kind of leadership are you going to entrust your future with this Company? Is it unselfish leadership, or is it not? Is it interested in your personal, individual welfare, or is it self-seeking? If an outside organization, on the basis of its past record is it open and above board and dependable, or don't you know?" (*idem*).

In dismissing the petition, the Circuit Court wrote:

> "On the record now before us, it is our opinion that the expressions contained in the letter of enclosure, standing alone as they indisputably do, are privileged and that the privilege was not lost through any threat or act of discrimination, coercion or intimidation by either of the respondents in

violation of the employees' rights under the Act" (p. 929).

In the case at bar, it is the comment of the employer, "standing alone", which constitutes the entire basis of the State Board's order. Only tortuous reasoning can connect that comment with the single objective fact found by the State Board, to-wit, the discharges.

The Circuit Court answered in the negative the question "whether the words used are used in such circumstances and are of such a nature as to create a fear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (page 927).

At bar, even one of the Board's witnesses testified that Marcus said "he did mention about he didn't mind us organizing" (R. 705), although the Board, in its summary (R. 1348-9), did not include that. As already mentioned, Marcus might have phrased his comment in finer fashion, but there can be no gainsaying that the substantive effect of what he said is not dissimilar from the language approved by the Circuit Court, approval given by a court that had decided otherwise in a case involving the same fundamental proposition, *National Labor Relations Board* v. *New Era Die Co. Inc.*, 118 Fed. 2d 500, 505.

Without further citation, the Court is respectfully referred to the reasoning of the Circuit Court (case cited, (pages 926-7). Petitioners urge that what is there said is determinative at bar.

In *National Labor Relations Board* v. *Ford Motor Co.*, 114 Fed. 2d 905, cert. den. 312 U. S. 689, the Circuit Court for the Seventh Circuit considered at length this basic issue of an employer's right of comment. That part of the order of the National Board which forbade dissemination of propaganda by the company among its employees, was set aside (page 916). The company's publications were in some respects stronger than the utterances at bar. In its "Viewpoint on Labor", the company wrote:

> "But, now along comes another group that says: 'There are 100,000 jobs out at Ford's. If you want one of them, pay us a registration fee, and so much every month, and we will pass you in, and you can work as long as you pay us * * * If you go into a union, they have got you, but what have you got? * * * If the union leaders are sincere, they should go into business themselves" (footnote 1, page 913).

Under the heading of "Fordisms", the company wrote:

> "Our men ought to consider whether it is necessary for them to Pay Some Outsider Every Month for the Privilege of Working at Ford's. What was the result of these strikes—merely that numbers of men put their necks into an Iron Collar. I'm only Trying to Show Who Owns the Collar" (idem, p. 914).

In taking up the constitutional contention of the *Ford Company*, the Circuit Court discussed that issue on the same fundamental basis that petitioners here urge upon this Court. Beginning with the premise that "nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment", and addressing itself to the argument of the National Board, that these are "qualified and not absolute" rights, and that the employer's expressions were "set against a background of publicity declared opposition by Mr. Ford to the unionization of his plant", and recognizing the ease with which employer influence may become undue, the Circuit Court wrote:

> "This holds the employer forever suspect and in practical application must necessarily silence him whose opinion may be the best informed, no matter how honestly his views may be entertained, or how truthful may be his observations. If the concept

> that an employer's opinion of labor organizations and organizers must, because of the authority of master over servant, nearly always prove coercive, ever had validity, it is difficult now to say, in view of the National Labor Relations Act, its adjudication as constitutionally valid, its strict enforcement by the National Labor Relations Board, and the liberal attitude of the courts in construing it so as best to effectuate its great social and economic purpose, that the concept is still a sound one. The servant no longer has occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied" (page 914).

Petitioners can say no more. Many indeed are the cases in which the constitutional guarantees have been invoked by an employer found by the National Board to have violated the National Act.[1] There is no case involving a state labor relations act. The reported cases, of course, vary in respect of their factual situation and therefore cannot be of precise authority at bar.[2] But, as aptly phrased by Justice Jackson,

> "If this Court may not or does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one." *Thomas* v. *Collins* (*loc. cit. supra*, page 356).

Nowhere has it been held that this Court is barred, under the statutory provision making findings of fact by

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1. To note but a few: *NLRB* v. *Laister-Kaufman Aircraft Corp.*, 144 Fed. 2d 9, *Elastic Stop Nut Corp.* v. *NLRB*, 142 Fed. 2d 371, cert. den. 322 U. S. IX; *Jacksonville Paper Co.* v. *NLRB*, 137 Fed. 2d 148, cert. den. 320 U. S. 772, *NLRB* v. *Pick Mfg. Co.*, 135 Fed. 2d 329, *NLRB* v. *Trojan Powder Co.*, 135 Fed. 2d 337, cert. den. 320 U. S. 768, *NLRB* v. *Sunbeam Electric Mfg. Co.*, 133 Fed. 2d 856, *NLRB* v. *Schaefer-Hitchcock Co.*, 131 Fed. 2d 1004, *NLRB* v. *Sunshine Mining Co.*, 110 Fed. 2d 780, cert. den. 312 U. S. 678.

2. Apropos of the stress laid by the State Board on the comment by Marcus referring to junior employees, *NLRB* v. *Citizen-News Co.*, 134 Fed. 2d 962, 965, is of interest.

the Board conclusive, if supported by evidence, from inquiring into the application of a constitutional guarantee. To do that would be to make an empty bubble of judicial review and oust this Court from the discharge of its highest function, the vigorous protection of these basic rights of the citizens of this country.

Conclusion.

In this petition asking for review by this Court, petitioners urge:

First: This Court has not yet considered a case involving the constitutional guarantees of free speech and equal protection of the laws, arising out of the enforcement of a state labor relations act, and particularly the Act of the State of New York.

Second: The record at bar discloses clearly that the State Board has not, within the purview of the criticism voiced by this Court in *Virginia Electric and Power Co.* v. *National Labor Relations Board,* 314 U. S. 469, clearly indicated the basis of its decision.

Third: To the extent that the State Board relied on the utterances condemned by it, the affirmance thereof by the courts below violated petitioners' constitutional guarantees, on the ground that such utterances are protected and privileged.

Fourth: The utterances condemned below fall within the area of comment declared by this Court to be protected, devoid as they are, by explicit wording, by act, by association, or by implication, of that coercion and intimidation declared by this Court to remove such utterances beyond the area of privilege.

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